

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
WideOpen West Finance, LLC	)	CS Docket No. 97-80
	)	
Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules	)	CSR-7139-Z
	)	
Implementation of Section 304 of the Telecommunications Act of 1996	)	
	)	
Commercial Availability of Navigation Devices	)	
_____	)	

**Comments of the Consumer Electronics Association  
on WideOpen West Finance, LLC Request for Waiver  
of 47 C.F.R. § 76.1204(a)(1)**

May 3, 2007

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**Comments of the Consumer Electronics Association  
on WideOpen West Finance, LLC Request for Waiver  
of 47 C.F.R. § 76.1204(a)(1)**

The Consumer Electronics Association (“CEA”) submits these comments in response to the request for waiver of Section 76.1204(a)(1) of the Commission’s rules by WideOpen West Finance, LLC d/b/a WOW! Internet, Cable and Phone (“WOW”).<sup>1</sup> Petitioner, less than half a year before the effective date of an obligation announced by the Commission almost nine years ago, filed for an apparently complete exemption from this obligation, on three bases, none of which should qualify WOW for a waiver: (1) WOW is a direct competitor of other cable operators, (2) WOW believes, erroneously, that DBS providers have received a waiver of this rule, and (3) WOW currently operates an analog cable system and is planning to present the same services by digital means.

Nine years ago, the Commission determined that the best way to fulfill Congress’s mandate to “assure the commercial availability” of competitive navigation

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<sup>1</sup> *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7139-Z, Request for Waiver of the Set-Top Box Integration Ban, 47 C.F.R. § 1204(a)(1) (Feb. 28, 2007) (“WOW Request”).

devices is to require cable operators to support navigation devices purchased at retail, and later to require operators to rely on the same physically separable conditional access technology that they support for retail devices. The Commission has repeatedly reconfirmed its commitment to thus assuring competition. The Court of Appeals for the District of Columbia Circuit has twice rejected challenges to this common reliance rule.<sup>2</sup>

The WOW request seems grounded in contradictions and uncertainties:

- If, as stated, WOW now operates only on *analog* cable system, how can it already be providing digital CableCARDS to its customers, as it purports now to be doing?
- While WOW grounds its request on its need for and price considerations as to low-end converter boxes, WOW nowhere states what model boxes it requests should or should not be the beneficiaries of any waiver if granted.
- Like NCTA and Comcast, WOW grounds its request on some indefinite plan to move to DCAS in the future, when (1) WOW is only now acquiring a fleet of integrated security set-top boxes, and (2) as CEA and others have noted on several occasions, the CableLabs DCAS proposed product and licensing regime has never been shown to be compliant with this and related FCC regulations, either, and in fact appears not to be compliant.

In short, rather than conforming to its purported model of Bend Broadband, which was in the process of perfecting an all-digital system, WOW appears to be asking for relief so that it can move to a system that more directly resembles that of Comcast. Accordingly, WOW's request appears to be more in the mold of those filed by NCTA,<sup>3</sup> Comcast,<sup>4</sup> and RCN.<sup>5</sup> CEA hereby incorporates by reference its responses to those requests, and to Comcast's appeal from the denial of its own request.<sup>6</sup>

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<sup>2</sup> *General Instrument Corp. v. FCC*, 213 F.3d 724 (D.C. Cir. 2000); *Charter Communs., Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

<sup>3</sup> See Commercial Availability of Navigation Devices, CS Docket No. 97-80, CSR-7056-Z, Comments of the CEA on the National Cable & Telecommunications Association Petition for Waiver of 46 C.F.R. § 76.1204(a) (Nov. 30, 2006) ("CEA Comments on NCTA Petition for Waiver").

<sup>4</sup> *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7012-Z, Comcast Corporation's Request for Waiver of 47 C.F.R. § 1204(a)(1) (Apr. 19, 2007).

The sole operative and relevant fact cited by WOW is that its vendor, one of the dominant suppliers of navigation devices to the cable industry, though aware of this regulation for almost nine years, purportedly has chosen not to field a low-end product that complies with FCC rules. The Commission should not grace and implicitly endorse such vendor fiat just because regulated entities, with almost a decade of lead time, chose not to insist that their vendors supply them with compliant products.

#### **I. The WOW Request Seems Grounded In Contradiction And Imprecision.**

WOW says it runs an analog cable system, but “. . . must now migrate to a digital simulcast solution.”<sup>7</sup> If WOW’s system is still all analog, then WOW (1) cannot possibly be presently offering digital CableCARDS to its customers, as it claims to do,<sup>8</sup> and (2) is far from the mold of Bend Broadband, which demonstrated near-completion of an all-digital system.

Like Comcast, WOW argues for a waiver based on vendor-imposed price differentials for “low-end” set-top boxes, but WOW does not actually limit its waiver request to such limited-function boxes. Indeed, WOW claims that a waiver is necessary in order to go *head to head* with Comcast -- which also offers high-end and “PVR” boxes for which Comcast did not seek any waiver.

Like NCTA, WOW cites the Commission’s more general forbearance as to DBS, but misunderstands and mischaracterizes the Commission’s actions re DBS as a

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<sup>5</sup> *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7113-Z, RCN Corporation’s Request for Waiver of 47 C.F.R. § 1204(a)(1) (Nov. 17, 2006).

<sup>6</sup> *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7012-Z, Comments of the CEA on Request for Waiver of 47 C.F.R. § 76.1204(a)(1) (June 15, 2006); CEA Comments on NCTA Petition for Waiver, *supra*; *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7113-Z, Comments of the CEA on the RCN Corp. Request for Waiver of 47 C.F.R. § 76.1204(a)(1) (Mar. 5, 2007); *Commercial Availability of Navigation Devices*, CS Docket No. 97-80, CSR-7012-Z, Opposition of CEA to Comcast’s Application for Review (Feb. 14, 2007).

<sup>7</sup> WOW Request at 18.

<sup>8</sup> *Id.* at 21.

“waiver.”<sup>9</sup> The argument that the Commission should be obliged to forbear re cable because it found grounds to do so re DBS was considered and rejected by the Court of Appeals only last year.<sup>10</sup>

## **II. WOW Is Not Entitled To A Waiver Based On A Vague Intention To Adopt DCAS At Some Future Time.**

WOW is even less specific than others as to when it would actually move to DCAS, and whether in light of its not-yet implemented plan to buy all-new, integrated security digital converter boxes, it will actually do so. Moreover, WOW, unlike Comcast or the NCTA, is admittedly not in any position to make *any* representations as to the licensing intentions of CableLabs. Indeed, WOW has not asserted that it is privy to the proprietary information about DCAS as to which CableLabs has, by maintaining the relevant information about DCAS under Nondisclosure Agreement, avoided any public comment to, or public discussion with the Commission. ***Thus, WOW cannot be in any position to represent to the Commission that its projected implementation of DCAS will comply with this or the other relevant FCC rules.*** Any statement, hope, or promise of WOW with respect to DCAS, therefore, cannot be subject to public comment, cannot be sensibly reviewed by the Commission, and thus cannot be afforded any weight.

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<sup>9</sup> See CEA Comments on NCTA Petition for Waiver at 10. CEA hereby incorporates by reference its Comments with respect to the Comcast and NCTA waiver requests in CS Docket No. 97-80.

<sup>10</sup> *Charter Communs., Inc.*, 460 F.3d at 42-45.

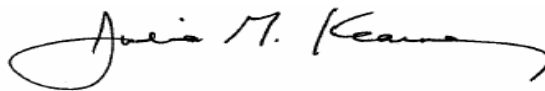
### **III. WOW Cannot Be Considered A New Entrant Providing New Services.**

The disclosures in WOW's request indicate that (1) the services provided by WOW are no different than those provided by competitors and cannot be described as "cutting edge" in any sense, and (2) WOW has had adequate time to plan a compliant system and most likely would have done so had it chosen a vendor that planned to offer compliant products. Accordingly, WOW's citation to precedent as to systems that offer new technology or new services to consumers is simply irrelevant.

### **IV. WOW's Status As An "Overbuilder" Is Not Sufficient To Entitle WOW To A Waiver.**

When the contradictions, vagaries, and incorrect analogies and references are filtered out, the WOW waiver request boils down to an argument that WOW's status as an overbuilder should allow WOW, and its chosen vendor, to simply ignore longstanding regulations, that apply to all cable systems, via a last-minute plea as the deadline approaches. Granting such a request would not be consistent with establishing and maintaining respect for Commission regulations – particularly those, such as this one, that arise from a direct congressional mandate. The WOW petition is insufficient on its face and, in any event, should be denied.

Respectfully submitted,



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Dated: May 3, 2007

## **CERTIFICATE OF SERVICE**

I do hereby certify that on May 3, 2007 I caused a true and correct copy of the foregoing Comments of the Consumer Electronics Association on the WideOpen West Finance, LLC Request for Waiver of 47 C.F.R. § 76.1204(a)(1) to be served via overnight mail on the following:

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/s/ Patricia O'Keefe  
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